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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1954

No. 456

MAX SCHMIDT,

Petitioner,

vs.

ALBERT SHELL, MARTHA SHELL, ARTHUR G. JOHNSTON, DOROTHY E. JOHNSTON, EDWARD C. BRICHTA, DORA R. BRICHTA, FRANK W. DOUGLAS, EDITH E. DOUGLAS, DONALD W. TEETER, ANN TEETER, CASPAR J. HEXBERG, PATRICIA M. HEXBERG, KENNETH THUNEN, SHIRLEY THUNEN, GUSTAVE KOTTA, NELDA M. KOTTA, WILLIAM F. MITCHELL, WANDA MITCHELL, PETE C. RODRIGUEZ, NATALIE RODRIGUEZ, HERMAN T. SCHNEIDER, RITA B. SCHNEIDER, ERNEST S. COCCARY, and HELEN A. COCCARY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division One.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division One.

Max Schmidt prays that a writ of certiorari issue to review the judgment of the District Court of Ap-

peal, State of California, First Appellate District, Division One, entered in the above-entitled case on June 29, 1954, the Supreme Court of the State of California having denied a petition for a hearing on the 26th day of August, 1954.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court of Appeal, State of California, printed in Appendix B hereto, *infra*, page 5, is reported at 126 A.C.A. 378 and 272 P. 2d 82.

JURISDICTION.

The judgment of the District Court of Appeal of the State of California was entered on June 29, 1954. (R. 551-565.) A timely petition for rehearing, filed on July 14, 1954 (R. 566-587) was denied on July 26, 1954. (R. 603.) A timely petition for a hearing by the Supreme Court of California, filed on August 9, 1954, (R. 604-652) was denied on August 26, 1954. (R. 674.)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), since rights, privileges and immunities are specially set up and claimed under the Constitution, and statutes of, and authority exercised under, the United States.

QUESTION PRESENTED.

Whether an application of a contractor for priorities for building materials and its granting by the Federal Housing Administration, pursuant to the Veteran's Emergency Housing Act of 1946 and Priorities Regulation 33, is a contract through which the United States is exercising its constitutional powers, and hence a contract whose construction presents questions of federal law not controlled by the law of any state, and a contract that must be construed with reference to the federal statutes and regulations involved rather than by state laws and decisions of California recognizing third party beneficiary contracts in the case of private transactions and causes of action for fraud.

STATUTES AND REGULATIONS INVOLVED.

The statutory provisions involved are sections 5 and 7 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 50 U.S.C.A. Appendix, 1821 et seq., and the pertinent regulation is Priorities Regulation 33 of the Civilian Production Administration, promulgated under the Second War Powers Act of 1942 as amended, 50 U.S.C.A. Appendix, 631-645b. Pertinent portions of said Housing Act and said Regulation are printed in Appendix A, *infra,* page 1.

STATEMENT OF THE CASE.

This action is brought by twelve married couples (veterans and their wives), seeking recovery of damages for the alleged failure of Schmidt, a building

contractor, to comply with the plans and specifications filed with his application to the Federal Housing Authority for priorities for materials used in the construction of homes purchased by the plaintiffs from the defendant.

During the period when the Veterans' Emergency Housing Act of 1946 was in effect, Schmidt applied for priorities for building materials and as a part of his application and as required by federal law, he or his agent signed a certificate which reads in part as follows:

> "* * * I further certify that I will construct the project in accordance with the description given in this application, that I will observe the restrictions on sales prices and rents to be charged for the dwelling units as specified in items 4 or 5 of this application, that I will give preference to veterans in selling or renting the units, and that I will comply with all other provisions of Priorities Regulation 33 and other applicable orders or regulations in the construction and distribution of the dwelling units covered by this application." (R. 60.)

There are thirteen counts in the complaint.

Each of the first twelve counts is brought by one couple, relates to the sale and purchase of a single dwelling unit, and purports to charge the defendant with fraud as to the particular transaction, and each set of plaintiffs asks $4800 for damages. (R. 3-50.)

All plaintiffs join in the thirteenth count and seek to impose liability upon the contractor, Schmidt, as to all twelve sales upon the theory that his application

for priorities and its granting pursuant to federal statute created a contract between Schmidt and the United States of America for the benefit of a third party, i.e., the veterans, and that Schmidt breached, what plaintiffs term, a common law, third party beneficiary contract, by deviation from the plans and specifications which were filed with his application for materials' priorities. The thirteenth count alleges total damages of $57,600.00, or $4800.00 per couple. (R. 50-55.)

In other words, each set of plaintiffs has brought an action on alternative theories of recovery—fraud and breach of a third party beneficiary contract.

The contract of sale with respect to each of the twelve dwelling units was entered into more than one year prior to commencement of the action.

On its face the complaint shows that plaintiffs claim rights and privileges arising out of the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33. See, for example, paragraphs III thru XVI of the purported first cause of action, (R. 4-10) and paragraphs I thru XVIII of the purported 13th cause of action. (R. 50-54.) (See Appendix "C" *infra,* page 28.)

The federal question to be reviewed was timely and properly raised by the defendant, Max Schmidt, the petitioner herein, by a pleading, to wit, general and special demurrers to the complaint and each of the purported causes of action. (R. 70-77.) (See Appendix "C", *infra,* page 36.) He particularly stressed the point "That it appears from the face of the complaint

that the alleged thirteenth cause of action is barred by the statute of limitations in that the said thirteenth cause of action is alleged to arise out of an agreement between the defendants and the government made for the benefit of third parties in accordance with certain statutes of the United States alleged in the complaint, and that the only portion of said statutes which expresses an intent to benefit third parties or to give third parties a right to sue thereon is subject to a one-year statute of limitations as a limitation upon the right thereby conferred." (R. 76.)

Defendant's general and special demurrers to the complaint were overruled by the trial court. (R. 82.)

In his answer, defendant again raised the federal question, alleging that none of the thirteen counts stated a cause of action, and that it appeared from the face of the complaint that the 13th count was barred by the statute of limitations set forth in Section 7(d) of the Veterans' Emergency Housing Act of 1946, and alleged that there had been a modification or alteration of the original application by consent of the United States Government. (R. 83-93; Appendix "C", *infra,* page 37.)

A jury trial was had, and the jury brought in verdicts of $1250.00 for each set of plaintiffs on the twelve fraud counts, and awarded all the plaintiffs $12,000.00 collectively on the contract count. The defendant appealed.

On his appeal, defendant contended that in the premises (1) plaintiffs are without right to maintain, and have failed to state, a cause of action for fraud,

or a cause of action for breach of contract or for violation of the applicable statutes or regulations; and (2) assuming that plaintiffs may resort to the remedy of fraud, they have, respectively, failed to state a cause of action for fraud, and failed to prove a cause of action for fraud.

However, the District Court of Appeal held (1) that causes of action for fraud and a cause of action for breach of a third party beneficiary contract were stated; (2) that no cause of action for fraud was proved as to nine sets of plaintiffs; and (3) that liability had been established for fraud as to three sets of plaintiffs, and that liability for breach of a third party beneficiary contract (the 13th count) had been established, and reversed the judgments for plaintiffs, with instructions to the trial court to retry the issue of damages only, and when such damages have been ascertained to enter judgments in favor of plaintiffs in the amounts so fixed.

The District Court of Appeal held that the 13th count is supported on a non-federal ground. However, *petitioner submits that the non-federal ground (third party beneficiary theory) cannot independently or adequately support a judgment on the 13th count, because such a non-federal question is clearly interwoven with the federal question involved.* Indeed, the District Court of Appeal expressly calls "the application and its granting under the federal statutes here involved," a contract. If it is a contract, it must, therefore, be a contract made pursuant to a federal statute, and in that case it is a contract that must be construed ac-

cording to the pertinent federal statute, and not according to state law. *United States v. Allegheny County,* 322 U.S. 174; *Kauffman v. Kauffman,* 93 C.A. 2d 808, 210 P. 2d 29; *Wissner v. Wissner,* 338 U.S. 655.

When the California court states that "the federal statute is only relevant as setting up a standard against which to measure the acts of the appellant in failing to perform according to the plans and specifications required by that statute" (Appendix B, page 12), it departs from the established rule of law that the construction of a contract made pursuant to a federal statute presents questions of federal law. The court cites no authority for such departure. It seems to ignore the principle that the Veterans' Emergency Housing Act, as a national law, should be uniform in operation in all of the states.

Petitioner's contention is that if plaintiffs have any right at all to enforce the contract between Schmidt and the United States Government by bringing a civil action against him, that right must be found in the federal statute. Such right is only to the extent covered by section 7(d) of the Veterans' Emergency Housing Act of 1946, which is a one-year statute of limitations. (Appendix A, page 2.) Plaintiffs did not bring such action within the one-year period, and hence they are barred.

Defendant urged these same points in his petition for a rehearing by the District Court of Appeal and in his petition for a hearing by the Supreme Court of the State of California, but, as stated above, both petitions were denied.

REASONS FOR GRANTING THE WRIT.

1. A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT, AND HAS DECIDED IT IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the District Court of Appeal in the instant case is in conflict with the following well-established and fundamental principle, announced and followed by the United States Supreme Court in *United States v. Allegheny County,* 322 U.S. 174, 183:

> "* * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (cases cited.)"

That basic principle has been applied to War Risk Insurance contracts between the United States and servicemen; and it has been held that there is no third party beneficiary contract created under any state law in connection with such a contract made pursuant to federal statute. See *Kauffman v. Kauffman,* 93 C.A. 2d 808, 210 P. 2d 29, for application of this principle in connection with California law. There the court correctly followed *White v. United States,* 270 U.S. 175, 180, and other federal cases holding that the insurance contract is solely between the government and the insured and the only relations of contract are between the government and him.

The case of *Wissner v. Wissner,* 338 U.S. 655, arose in California. Community funds had been used to pay

War Risk Insurance premiums, and after the death of the insured his surviving wife sought part of the proceeds of the insurance on the ground that she was entitled to them under California community property law. The District Court of Appeal, Third Appellate District, State of California, affirmed a judgment for the wife, but on appeal to the United States Supreme Court judgment was reversed, on the ground that the insurance contract presented questions of federal law not controlled by the law of any state.

In *Sedivy v. Superior Home Builders,* 188 F. 2d 729 (C.A. 7th Cir., Illinois), in construing the Veterans' Emergency Housing Act of 1946, the Court of Appeals held the rights of the purchasers should be construed according to the pertinent statute and regulation, and, at page 734, stated, "that their rights must be determined by the same yardstick whether they sue at law or in equity."

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2. THE QUESTION PRESENTED IS OF IMPORTANCE IN THE ADMINISTRATION OF FEDERAL HOUSING LAWS, AND OF ALL OTHER FEDERAL LAWS UNDER WHICH PRIORITIES MAY BE GRANTED TO CONTRACTORS UPON THEIR PROMISE TO DO OR NOT TO DO A CERTAIN THING. IT IS IMPORTANT IN CONNECTION WITH THE CONSTRUCTION OF ANY CONTRACT THAT AN INDIVIDUAL MAY MAKE WITH THE UNITED STATES PURSUANT TO A FEDERAL STATUTE.

Such contracts are primarily governmental regulations of the United States and should not be construed as private contracts under state laws.

It is axiomatic that there should be a uniformity of operation of the laws of the federal government throughout the states, and if such uniformity is to be effected the federal law must be dominant over the laws of the several states.

The third party beneficiary contract is not universally recognized in America. While California recognizes both a creditor beneficiary type of contract, and a donee beneficiary type of contract, some other states recognize only the donee beneficiary type, and still others recognize only the creditor beneficiary type; and some don't recognize any third party beneficiary contract at all. So far as petitioner knows, the United States Supreme Court has never definitely accepted the third party beneficiary contract theory. (See *Second National Bank v. Grand Lodge,* 98 U.S. 123.)

Although the District Court of Appeal says that the purchasing veterans have common law rights in addition to the rights given by the federal statute, it is clear that the 13th count of the complaint is not brought upon any generally recognize "common law" right, but instead is purportedly brought under a California statute permitting enforcement of a third party beneficiary contract.

It would be ridiculous to assume that when the United States granted the application for priorities under the Veterans' Emergency Housing Act, it intended that purchasers in California should receive rights that purchasers in other states would not receive under identical applications for priorities. Indeed, there is no authority cited for the holding that

the Federal Government entered into a third party beneficiary contract—except to the extent set forth in Section 7(d) of the Act.

If the Congress had intended that the veterans purchasing homes under the Veterans' Emergency Housing Act of 1946 should receive additional rights of enforcement above and beyond those specified in Section 7(d), it would have been a very easy matter to spell out such rights in the Act.

In *United States v. Sauers,* 99 F. Supp. 753 (D.C. Minn. 3d Div.) the Government brought an action under Section 7(a) and (c) of the Act, against a building contractor, for a mandatory injunction requiring the defendant to make restitution to certain purchasers of homes constructed by the defendant, with reference to which the Government contended there were "omissions" and "substitutions" amounting to a departure from the "specifications contained in the application as approved by the Federal Housing Administration" governing the maximum sale price.

The U.S. District Court said, "It is conceded that the individual purchasers who would benefit by recovery are barred by the applicable statute of limitation." This can only mean that the United States, through the administrative agency involved, agreed that the purchaser had no right to bring an action for damages for non-conformity with the specifications after the one-year statute of limitations had expired. While the Court held that the United States was not bound by that one-year statute (Section 7(d)), it clearly did not hold that the Government had six years, under the

Minnesota statute of limitations, within which to bring an action on contract. The Court in effect held that the Minnesota state law concerning contracts did not apply. In rendering judgment for the defendant, the Court said, at 99 F. Supp. 755:

> "Plaintiff permitted three years to elapse after the sale of the houses before instituting this proceeding. *The relief sought is governed by the applicable Housing Act,* a war measure requiring prompt enforcement." (Emphasis added.)

Likewise, in *United States v. Austin,* 100 F. Supp. 33 (D.C. Md.) the Government brought an action, under Section 7(a) *to enforce compliance with a public law.*

Thus, the decision of the California Court is at variance with the well-established construction given the statute by the administrative agents charged with its enforcement. The agents appear to have readily conceded that except for the rights granted by Section 7(d), the purchasers had no rights to maintain causes of action for breach of contract when such causes of action are predicated on failure to comply with the plans and specifications submitted to the F.H.A. On the other hand, the Government had rights under Section 7(a) and (c), to enforce compliance with a public law.

Settlement of the question presented by this petition is plainly in the public interest, for thousands—perhaps millions—of American citizens should be apprised of their rights as potential third party beneficiaries in the event the established national law is to

be or has been changed so that state law can be applied in construing contracts made by the United States Government pursuant to a federal statute. If on the other hand, the law still is, as petitioner contends, that a contract made pursuant to a federal statute must be interpreted according to that statute, and not according to state law, then in that event, American citizens should be spared fruitless litigation and multitudinous suits, by a determination of that question by this court.

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3. THE DECISION OF THE DISTRICT COURT OF APPEAL IS BELIEVED TO BE ERRONEOUS.

No statutory cause of action for fraud was given to the veterans by the Veterans' Emergency Housing Act of 1946. No cause of action for fraud under the laws of California has been pleaded or proved, since no "out-of-pocket loss" has been alleged or proved. See *Bagdasarian v. Gragnon,* 31 Cal. 2d 744, and *Gagne v. Bertran,* 43 A.C. 486.

There can be no doubt that if Schmidt's application and its granting by the United States Government was a contract, it was a contract made in pursuance of a federal statute.

Since it was a contract made in pursuance of a federal statute (and not a simple common law contract), it must be construed with reference to that statute rather than by state laws and decisions governing private transactions. (*United States v. Allegheny County,* 322 U.S. 174, and cases cited therein; *Kauffman v. Kauffman,* 93 C.A. 2d 808; *Wissner v. Wissner,* 338 U.S. 655.)

The lower court errs, therefore, in holding that: "Respondents here are relying on common law causes of action that do not find their origin in that statute. The statute merely establishes the standard by which appellant's conduct is to be measured."

The opinion of the District Court of Appeal states: "All the federal cases to which we have been referred that have found it necessary to discuss the nature of the application and its granting under the federal statutes here involved, have referred to it as creating 'a contract' between the government and the contractor. (*United States v. Sauers,* 99 Fed. Supp. 753, 755; *United States v. Austin,* 100 Fed. Supp. 33, 41.)"

However, neither the *Sauers* case nor the *Austin* case was an action on the contract. Both actions were brought by the Government under Section 7(a) of the Veterans' Emergency Housing Act to enforce compliance with a public law. As a matter of fact, in the *Sauers* case, although Minnesota has a six-year statute of limitations for contracts, the Court held that the plaintiff was guilty of laches for having failed to bring the action within three years after the sale of the houses, since the relief sought was governed by the applicable Housing Act.

The lower court also states that in *Adams v. Albany,* S.D. Cal. N.D., 80 Fed. Supp. 876, "it was indicated, by way of dicta, that common law remedies existed under the Veterans' Emergency Housing Act of 1946." But in that case the common law remedies sought were for common law causes of action for fraud in the breach of an express contract between the purchaser and the seller—not for any breach of a

denied, 342 U.S. 902) where the Court held that as to dwellings built under the Veterans' Emergency Housing Act of 1946, any right of action was barred by the one year limitations, and that insofar as the Second War Powers Act gave veterans the right to recover excess charges made for housing, it was superseded and supplanted by the Veterans' Emergency Housing Act of 1946.

The U.S. Court of Appeals, 7th Circuit, expressly distinguished the case of *Keele v. Holt, supra,* affirmed the order of the trial Court dismissing the complaints, and stated at 188 F. 2d 734:

> "* * * plaintiffs bring their actions in equity for a mandatory injunction requiring restitution. Emphasis is placed upon the inherent power of a court of equity to remedy the wrong assertedly perpetrated upon the plaintiffs, and it is argued that to do so we need not rely upon any express statutory provisions. Whether plaintiffs were entitled under the 1946 or any other Act to proceed in equity for an injunction presents a dubious question which we need not decide. At any rate, no case is cited and we know of none which would authorize a court to order the restitution sought, in the absence of statutory authority. Plaintiffs appear to so recognize because by their complaints they attempt to state a cause of action based upon their rights as fixed by statute and regulation. Under the circumstances, we are of a view that their rights must be determined by the same yardstick whether they sue at law or in equity."

It is respectfully submitted that any rights and remedies which plaintiffs may have to enforce the

promise that the contractor made to the Government, must arise out of the federal statute and regulation involved. The so-called contract is not independent of the statute. It it were not for the federal statute, there would have been no such application for priorities. It is from the statute itself that plaintiffs obtained whatever rights of enforcement they may have.

Since Respondents have not brought themselves within the provisions of the federal statute by commencing their action within one year from the date of the respective sales, they have failed to state and prove a cause of action. Consequently, the District Court of Appeal of the State of California has erred in holding that any causes of action were stated or proved.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
November 19, 1954.

Respectfully submitted,
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Of Counsel.

(Appendices A, B and C Follow.)

Appendix A

PERTINENT TEXTS FROM STATUTE AND REGULATION.

The controlling statute is the Veterans' Emergency Housing Act of 1946, (60 Stat. 207, 50 U.S.C.A. Appendix, 1821 et seq.). The declared purpose of the act as set forth in section 1 (a) thereof is to remedy the housing shortage, particularly for Veterans of World War II and their families by giving preferences to such veterans "at sales prices or rentals within their means" and to obtain these ends by expediting production and allocation of materials therefor. The act provides for the appointment of a housing expediter with various broad powers, including the power to establish maximum sales prices and to allocate and fix priorities for housing materials.

Section 5 of the act reads:

> "Sec. 5. It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. *It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act.* Notwithstanding any termination of this Act as contemplated in section 1 (b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses com-

mitted prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." (Italics added.)

Section 7 provides for the civil and criminal penalties for violations of the act. Subsection (a) reads:

"Whenever in the judgment of the Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 5 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, may be granted and if granted shall be granted without bond."

Subsection (b) prescribes criminal penalties for any wilful violation of the provisions of the statute.

Subsection (c) gives the district, state and territorial Courts concurrent jurisdiction of all proceedings brought under this section.

Subsection (d) reads as follows:

"(d) If any person selling housing accommodations violates a regulation or order prescribing a maximum selling price, the person who buys such housing accommodations may, *within one year from the date of the occurrence of the violation,* bring an action for the amount by which the consideration exceeded the maximum selling

price, plus reasonable attorney's fees and costs as determined by the court." (Italics added.)

The pertinent regulation is Priorities Regulation 33, of the Civilian Production Administration, promulgated under the Second War Powers Act and which covers much the same ground as the Veterans' Emergency Housing Act of 1946. It prescribes the method, manner and means by which a contractor undertaking to build homes for sale to veterans and seeking materials' priorities for such purpose is to make application to the Civilian Production Authority. Section (e) thereof reads:

> "(e) *Construction of the project.* A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained written approval for a change from the agency which approved the original application."

Subsection (2) (i) of Section (g) provides that an application must contain a statement of the proposed maximum sales price, and Subsection (2) (ii) of Section (g) provides that a builder must not sell a dwelling unit for more than the maximum sales price "specified in the application, as approved."

Subsection (7) of Section (g) provides for application to the Federal Housing Administration by the builder for an increase in the sales price before sale of a dwelling unit.

Section (l) provides:

"A builder may apply to the agency which approved his application for an amendment to it. If the amendment covers changes in the specifications of the proposed dwelling or dwellings or changes in the proposed sales price * * * the request for an amendment may be made by letter in triplicate."

Section (n) prescribes criminal penalties for any wilful violation of the regulation.

Appendix B

(Vol. 126 A.C.A. 378.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 15,541

Albert Shell, Martha Shell, Arthur G. Johnston, Dorothy E. Johnston, Edward C. Brichta, Dora R. Brichta, Frank W. Douglas, Edith E. Douglas, Donald W. Teeter, Ann Teeter, Caspar J. Hexberg, Patricia M. Hexberg, Kenneth Thunen, Shirley Thunen, Gustave Kotta, Nelda M. Kotta, William F. Mitchell, Wanda Mitchell, Pete C. Rodriguez, Natalie Rodriguez, Herman T. Schneider, Rita B. Schneider, Ernest S. Coccary, and Helen A. Coccary,

Plaintiffs and Respondents,

vs.

Max Schmidt,

Defendant and Appellant.

OPINION AND JUDGMENT

Twelve sets of plaintiffs, each set consisting of a husband and wife, brought these actions against Max

Schmidt and others for fraud, and for breach of contract. The other named defendants were granted a nonsuit, the propriety of which is not involved on this appeal. The husband plaintiffs, all veterans, and their wives, had purchased homes from Schmidt, constructed by him in San Mateo County. The first 12 counts of the complaint, which are identical except for the names of the plaintiffs, all charge Schmidt with fraud as to each sale transaction. The 13th count, in which all plaintiffs join, charges the breach of a contract between Schmidt and the United States, it being averred that plaintiffs, as veterans, were third party beneficiaries of that contract. The fraud counts and the contract count are based on the same facts, and allege but one cause of action. The fraud alleged, so far as pertinent here, is that Schmidt in applying for priority permits from the Federal Housing Authority represented to and promised* that agency that he would build the houses in conformity with certain designated plans and specifications; that Schmidt failed to comply with the submitted plans and specifications in certain specified respects; that this caused damage to each set of plaintiffs, in certain particulars, in the total amount of $4,800. The breach of contract count alleges that Schmidt contracted and agreed with the F.H.A. to build the houses in conformity with the plans and specifications submitted by him in applying for the priority permits; that plaintiffs, as veterans, are third

*The fraud counts also allege that such representation was made to plaintiffs, but except as to three sets of plaintiffs, there was a complete failure to prove this allegation. This will be discussed later in this opinion.

party beneficiaries of that contract; that Schmidt violated the contract by not building in conformity with the plans and specifications in exactly the same respects alleged in the fraud counts; that plaintiffs were damaged in precisely the same respects and amounts as set forth in those counts. This count, in which all 12 sets of plaintiffs join, alleges a total damage of $57,600, or $4,800 to each set of plaintiffs. Thus, each set of plaintiffs pleaded but one basic cause of action for $4,800 damages, but alleged alternative theories of recovery—fraud and breach of contract. The jury brought in verdicts for $1,250 for each set of plaintiffs on the 12 fraud counts, and awarded all of the plaintiffs $12,000 collectively on the contract count. Thus, in legal effect, each set of plaintiffs was awarded a total of $2,250. From the judgments on these verdicts Schmidt appeals.

The facts are not substantially in dispute. On April 30, 1946, Schmidt applied to the F.H.A. under Priority Regulation 33 for priorities on building materials to construct 48 dwellings for veterans. Regulation 33 had been originally issued by the Civilian Production Administration pursuant to authority granted by the Second War Powers Act of 1942, as amended (50 U.S.C.A. (App.) §§ 631-645b). Later the Veterans' Emergency Housing Act of 1946 (50 U.S.C.A. (App.) 1821) empowered the Housing Expediter to delegate to the Civilian Production Administration certain powers conferred upon him by certain sections of the Veterans' Emergency Housing Act of 1946. This power was exercised, and Regulation 33 was continued

in effect under authority of both statutes, and was admittedly in effect at all times here pertinent.

This regulation prescribes in detail the method by which a contractor desirous of building homes for veterans and who needs material priorities, shall make application to the Civilian Production Administration (the F.H.A.). Among other things, the regulation, as amended, expressly provides that a builder constructing houses under it must perform the work pursuant to the description, that is, pursuant to the plans and specifications required to be submitted by the builder to the F.H.A., before he can secure the desired priorities. Another section of the regulation provides that all houses completed after the effective date of the regulation are subject to a maximum sales price established by the F.H.A.

When Schmidt applied for his permit he was required to and did submit plans and specifications of the proposed houses he desired to build. These specifications, among other things, represented that each house was to have exterior wall sheathing of wood, two 30,000 B.T.U. gas floor furnaces, and interior wall surfacing of gypsum lath and plaster. Pursuant to this application priorities were granted, and a maximum sales price of $9,700 per unit (later on Schmidt's petition increased to $12,000) was fixed by the F.H.A.

Between May 15, 1947, and November 13, 1947, the respondents purchased from appellant, or from his agents, for $12,000 each, 12 of the 48 houses then in various stages of construction. All of the 12 houses

purchased by respondents were built by appellant without compliance with and in violation of the plans and specifications submitted by him to the F.H.A. None of the 12 had an exterior sheathing of wood. The exterior walls, in fact, were made of construction paper covered with chicken wire and over this cement stucco was applied. Wood exterior wall sheathing protects a stucco house from wind and moisture, a protection not afforded by the paper type of construction used by appellant. Only one floor furnace, apparently of 30,000 B.T.U. capacity, was installed in each house, instead of the two called for by the specifications. Also in violation of the specifications, which called for interior walls of gypsum lath and plaster, sheet rock was used.

The complaint was filed February 11, 1949. In the first 12 causes of action, based on fraud, it is averred that on November 9, 1948, the plaintiffs first discovered the falsity of the representations made by appellant.

The evidence of the respondents as to the claimed misrepresentations can be summarized as follows: None of the respondents saw the plans and specifications prior to the time they purchased their homes, nor did they know what they contained. The Shells (first count) testified that they understood that the home was inspected and approved by the Veterans Administration. The Johnstons (second count) testified that they relied entirely on the government and its inspection service to see that they got a good buy,

and that the selling agent represented to them that the house they ultimately purchased was to be similar to the one across the street. That house had exterior wall wood sheathing which could then be seen. This led them to believe that their house was to be similarly constructed. Substantially similar testimony was given by the Douglases (fourth count). The Brichtas (third count) testified that they never saw the plans or specifications. Teeter (fifth count) testified that although he did not see the plans and specifications he knew that they existed, and he was told that the houses were government inspected. There is no evidence of the claimed representations made to the Hexbergs (sixth count) in the record. The Thunens (seventh count) were told by the selling agent that these homes were G.I. supervised by a G.I. appraiser. The Kottas (eighth count) testified that they relied upon the representation that the homes were government inspected. The Mitchells (ninth count) testified that although they were not told that their house was government inspected, they "figured" it was. They were told that the house was being built under G.I. specifications, and it was specifically represented to them that their house was to have wood sheathing. This is the only plaintiff who directly so testified. The Rodriguezes (tenth count) and the Coccarys (twelfth count) testified that they asked to see the plans and specifications, but did not receive them. Rodriguez testified that he was told not to worry about the plans and specifications because all of the houses were being

built according to specifications, and that the houses would be inspected and passed on by the government before he would be allowed to buy. Coccary was told that the plans and specifications were not available at the moment. The Schneiders (eleventh count) testified that they relied upon their house being a veteran's building for their protection.

All of the respondents who testified admitted that they had seen and inspected the houses before they purchased, and that they knew that their house contained but one gas furnace. None was aware of, asked any questions about, or paid any particular attention to the material used on the interior walls. All testified that their homes were not only underheated, but that, because of the inadequate exterior walls, they became damp and cold, and that mold and mildew grew on the back room walls. The evidence is ample and substantial to the effect that largely because of the inadequate exterior walls, and partly because of the inadequate heating equipment, the plaintiffs were made quite uncomfortable, and did not receive a house of the quality and type called for by the plans and specifications.

Testimony was given by an investigator from the office of the Housing Expediter that after the houses were purchased he visited the tract and discovered the variances from the specifications. He testified that, because of these violations, prosecution of appellant by the government was contemplated, but that the case was placed on the inactive list when it was learned that the homeowners would bring suit against him.

Appellant does not challenge the implied findings to the effect that he failed to construct the houses in accordance with the plans and specifications filed with the F.H.A., his basic contentions being that his exclusive liabilities for such violations and the exclusive remedies of the purchasers for such violations are controlled by the pertinent provisions of the Veterans' Emergency Housing Act of 1946, and that such statute does not confer on purchasers any right to maintain a cause of action for fraud or for breach of contract when such causes of action are predicated on failure to comply with the plans and specifications submitted to the F.H.A. Respondents, while conceding that the federal statute does not authorize fraud or breach of contract actions for such violations, maintain that the federal statute merely created additional statutory remedies and in no way affected the existing common law remedies for fraud or breach of contract. Respondents' theory is that they are suing on common law causes of action not grounded on the Veterans' Emergency Housing Act, and that the federal statute is only relevant as setting up a standard against which to measure the acts of the appellant in failing to perform according to the plans and specifications required by that statute.

We agree with respondents that the federal statute should not be interpreted as containing the exclusive remedies of purchasers so as to deprive them of their common law remedies. To do so would be to deprive veterans of most important rights, and after one year

from the date of purchase (the statute of limitations provided in the statute for the statutory remedies of purchasers) to confer immunity on contractors in their relations with purchasers. This would be in subversion of the very purpose and intent of the statute.

Section 5 of the Veterans' Emergency Housing Act of 1946 provides that it shall be unlawful to sell a house in excess of the maximum sales price fixed by the F.H.A., and also that it shall be unlawful for the contractor to violate the terms of any regulation or order issued under the provisions of the statute. It is thus made unlawful to violate any of the conditions imposed by Regulation 33. Section 7(a) of the act confers upon the government power to prosecute violators, and to obtain monetary compensation for purchasers from contractors on account of deficiencies in construction resulting from the contractor's failing to comply with the specifications filed by him. By section 7(d) the individual purchaser is granted the statutory right to sue the contractor for violation of the maximum selling price fixed by the F.H.A., and such action must be brought within one year from the date of the violation.

Based on these provisions it is appellant's argument that the purchaser has but one action—the right to seek recourse for an overcharge—which action must be brought within one year, and that the purchaser has no legal right to sue the contractor for fraud or breach of contract where such fraud or breach is predicated upon failure to comply with the specifications submitted.

There seems to be no case directly holding that, under the Veterans' Emergency Housing Act of 1946, the purchaser has remedies not therein conferred, but there are cases deciding a similar point under similar statutes. *Heinecke v. Parr,* 168 F.2d 194, and *Keele v. Holt,* 171 F.2d 480, held that, although, under the Second War Powers Act of 1942, neither that statute nor regulation 33 provided for actions for restitution or for an overcharge, such actions would lie under general equitable or common-law principles. In other words, such remedies existed in addition to those granted by statute. In *United States v. Austin,* 100 F.Supp. 33, it was recognized that the government could seek restitution even though the Second War Powers Act of 1942 did not provide for this remedy. In *Adams v. Albany,* 80 F.Supp. 876, it was indicated, by way of dicta, that common law remedies existed under the Veterans' Emergency Housing Act of 1946.

The theory of the cases holding that purchasers were not deprived of their common-law remedies by the Second War Powers Act of 1942, and that both the purchasers and the government had remedies not therein enumerated, was that the statute was passed for the benefit of veterans, and should be interpreted so as to help and to assist rather than to penalize them. Such reasoning is equally applicable to the Veterans' Emergency Housing Act of 1946. Not only does the very name of the statute disclose its purpose of aiding veterans, but such purpose has frequently been noted by the courts. In *Adams v. Albany,* 80 F.Supp. 876, 879, the court expressed this purpose in

the following language: "We start with the fact that the statute under discussion was passed for the benefit of veterans of World War II. It was an act of munificence on the part of a grateful Government toward those who served in World War II, which expressed itself in the form of assistance in the purchase of housing accommodations." (See comment U.S. Code Congressional Service, 79th Cong., 2nd Sess. 1946, p. 1177.)

This fundamental purpose would, in many cases, be defeated if the statute were interpreted so as to deprive the veterans of their normal remedies to the benefit of defaulting contractors—the very class it was the purpose of the statute to protect the veterans against. It must be held, therefore, that the enumeration of remedies in the statute merely created new enumerated remedies and was not intended to and did not deprive the veterans of any action for fraud or breach of contract that they might have under general common law principles.

But, says appellant, if veterans do have an action for damages caused by the failure of the contractor to follow the plans and specifications, whether in fraud or contract, such action must be brought within one year of the date of the violation as provided in the federal statute, on the theory that, when a statute creates a right, the expiration of the period set forth in the statute for the bringing of the action extinguishes such right. But that is not this case. The one-year statute applies only to the statutory right created by the statute—the right to bring an action

for an overcharge. But, the Veterans' Emergency Housing Act of 1946 did not "create" the causes of action for fraud and breach of contract. Respondents here are relying on common law causes of action that do not find their origin in that statute. The statute merely establishes the standard by which appellant's conduct is to be measured. It did not create the right to sue. Therefore, the statute of limitations applicable to the remedy created by the statute, has no application to the nonstatutory remedies. The actions were brought well within the periods applicable to the common law remedies here involved.

Appellant next contends that there was no evidence of fraud, and that the implied findings on that issue are unsupported by any substantial evidence. With that contention, as to nine sets of respondents, we must agree. The Hexbergs did not testify at the trial. There was no evidence at all of any fraudulent or other representations made to them. The other respondents admitted that they did not see the plans and specifications prior to the times of their respective purchases, and admitted that they did not know what they contained. They can hardly claim that they were induced to purchase in reliance upon any representations contained in the plans and specifications. Moreover, all respondents who testified, admitted that they had inspected the houses prior to purchase, and knew that they contained but one floor furnace. Such inspection also would have disclosed that the interior walls were not gypsum lath and plaster, but were constructed of sheet rock. Such evidence will not support

a finding of reliance or inducement upon which to predicate a fraud action. By their own testimony these respondents have negatived any inducement to purchase based on the provisions of the plans and specifications.

Respondents argue, in support of the fraud verdicts, that appellant was under a duty of disclosure, and that his nondisclosure constitutes fraud. There is, in general, a duty to disclose concealed defects known to the seller. (*Herzog v. Capital Co.*, 27 Cal.2d 349 [164 P.2d 8].) Obviously, although the interior wall finish and the number of furnaces were matters that a reasonable inspection would disclose, the sheathing under the exterior wall finish would not be disclosed by a reasonable inspection. But the type of sheathing used was not, in the absence of misrepresentation, a defect of the type referred to in the nondisclosure rule. Houses can be and are built with the type of construction here used. If the purchasers are not misled, such construction would not constitute a concealed defect. To find that the exterior wall construction is a defect, reliance must be had on the plans and and specifications, and none of the respondents knew what they contained.

This reasoning does not apply to three sets of respondents. Mrs. Mitchell (ninth count) testified that it was represented to her by the selling agent that the entire house, with the exception of the garage, was covered with wood sheathing. This was a direct misrepresentation of fact and sustains the finding of fraud as to this set of respondents. Mr. Johnston

(second count) when he asked the selling agent if the rest of the house subsequently purchased by him was covered with paper like the garage, was told: "No, it is like the rest of those houses being built across the street." Visual inspection disclosed that the houses referred to had wood sheathing on the exterior walls. Somewhat similar testimony was given by Mrs. Douglas (fourth count). Thus, positive misrepresentations sufficient to sustain the findings of fraud were made to these parties.

Respondents argue that the evidence is sufficient to indicate an intent to defraud a class, namely, veterans, and that in such a situation false representations made to any member of the class, can be relied upon by all other members of the class. In this connection section 1711 of the Civil Code is relied upon. It provides: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." That section would have been applicable had the representations made to Mitchell, Johnston and Douglas been published by Schmidt to veterans generally. (*Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713 [128 P.2d 522, 141 A.L.R. 1358].) But here there was no such public broadcast of the misrepresentations. The misrepresentations were made to particular individuals. In the instant case, although it was proper to join the 12 fraud counts in one complaint, each couple must recover, if at all, on the fraud issue, because of reliance upon misrepresentations made to

that couple, and cannot recover upon misrepresentations made to others, and not publicly made. (*Goodspeed v. Great Western P. Co.*, 19 Cal.App.2d 435 [65 P.2d 1342].)

But these arguments do not apply to the cause of action for breach of a contract made for the benefit of a third party. This is the 13th count of the complaint. That count is based on two premises. First, that the application for a permit and its granting subject to conditions resulted in a contract between appellant and the United States to the effect that appellant contracted and agreed to build the houses in conformity with the plans and specifications in exchange for a permit to secure priority for building materials then otherwise unobtainable. The second premise is that respondents, as veterans, who purchased the homes so built, were third party beneficiaries of this contract. Both premises are sound.

That the relationship between the government and appellant can properly be described as contractual is clear. Under the statute the contractor, in order to secure priorities for building materials, had to file a request therefor. This request could be granted only upon the contractor promising, among other things, that if priorities were granted, he would build in accordance with the plans and specifications. All of the elements of a lawful contract are present. All of the federal cases to which we have been referred that have found it necessary to discuss the nature of the application and its granting under the federal statutes here involved, have referred to it as creating a "contract"

between the government and the contractor. (*United States v. Sauers*, 99 F.Supp. 753, 755; *United States v. Austin*, 100 F.Supp. 33, 41.)

Once it is established that the relationship between the contractor and the government is contractual, it follows that veterans purchasing homes, that is, the class intended to be protected by that contract, are third party beneficiaries of that contract. As already pointed out, the statute and the regulations passed thereunder resulting in the contract were passed to aid and assist veterans and for their benefit. Purchasing veterans constitute the class intended to be benefited, and the contract must therefore be for their benefit.

Under section 1559 of the Civil Code embodying general common law principles, a third party beneficiary may maintain an action directly on such a contract. (See cases collected 12 Cal.Jur.2d 493, § 261.) The promise in such a situation is treated as having been made directly to the third party. (*J. F. Hall-Martin Co. v. Hughes*, 18 Cal.App. 513 [123 P. 617].) It is no objection to an action by the third party that the contracting party (here the government) could also sue upon the contract for the same breach. (*Malone v. Crescent City M. & T. Co.*, 77 Cal. 38 [18 P. 858].) Of course, the beneficiary must be more than incidentally benefited by the contract. An incidental beneficiary cannot successfully maintain an action. (Cases collected 12 Cal.Jur.2d 500, § 268.) Whether the beneficiary is or is not an incidental one, or a beneficiary for whose express benefit the contract was entered

into, is a question of construction. (*Woodhead Lbr. Co. v. E. G. Niemann Investments,* 99 Cal.App. 456 [278 P. 913].) It is not required that the third party beneficiary be specifically named as a beneficiary. All that section 1559 requires is that the contract be "made expressly for the benefit of third parties," and "expressly" simply means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly." (*Le Ballister v. Redwood Theatres, Inc.,* 1 Cal.App.2d 447, 448 [36 P.2d 827].)

Where the contract is for the benefit of a class any member or members of the intended class may enforce it. (*Garratt v. Baker,* 5 Cal.2d 745 [56 P.2d 225].) The fact that the government is one of the contracting parties does not change the rule. Agreements between a state or municipality with individuals have frequently been held to be third party beneficiary contracts for the benefit of some member or groups of members of the public. (See cases collected in annotation 81 A.L.R. 1271, at p. 1299.) Thus, there would seem to be no reasonable doubt but that the jury's findings that there was a third party beneficiary contract breached by appellant to the damage of respondents are amply supported by the record.

From this analysis it follows that nine of the judgments for $1,250 each based on fraud cannot be sustained, but three of such judgments are supported by substantial evidence. The judgment in favor of all respondents for $12,000 based on breach of contract is also supported by substantial evidence. If separate causes of action were involved, such a state of facts

would warrant an affirmance of the $12,000 judgment, and three of the $1,250 judgments, and a reversal of the other nine $1,250 judgments. But separate causes of action are not involved. Respondents have alleged the existence of but one primary right, and but one violation of that right. Such a complaint states but one cause of action, even though two or more theories of recovery are alleged. (*Work v. County Nat. Bank etc. Co.*, 4 Cal.2d 532 [51 P.2d 90].)

That but one cause of action was basically alleged is apparent. Each set of plaintiffs was seeking recovery of such amount as would place their home in the condition it would have been had compliance been had with the plans and specifications. To do this, it was alleged, would require $4,800. This sum was sought either on the theory of breach of contract or fraud, or both. But no matter how many theories of recovery were stated or proved, respondents were entitled to but one recovery which could not exceed $4,800. Double recovery could not be secured lawfully for the same identical violations of the plans and specifications. Once they have been reimbursed for their damages, regardless upon what theory such reimbursement is made, they have no lawful right to any more damages. This rule is stated as follows in 2 Freeman on Judgments (5th ed.), § 583, page 1235: "If a given state of facts entitles one to recover damages upon the theory of tort, and the same state of facts entitles him to recover upon the theory of contract, it would seem plain that recovery could not be twice had simply because the facts would support recovery upon either

theory." But the jury, pursuant to several and misleading instructions of the trial court, attempted to and did split the liability. This was error of a most serious nature.

The jury was given 26 forms of verdict, 13 in favor of respondents, 12 on the fraud counts and one on the contract count, and 13 similar forms for appellant. The jury was properly instructed on the measure of damages for fraud and the measure of damages for breach of contract, such measures, under the facts, being substantially identical. Then the court correctly told the jury that each set of plaintiffs could recover a maximum of $3,950*, "even though you should find that as to each cause of action, the cause of action for fraud and the cause of action for breach of contract, any one pair of plaintiffs has a right to recover." Then, after the jury had started its deliberations, it requested further instructions on the question of damages. The jury was then told that within the maximum limits it could allow damages on either the fraud counts or the contract count or both—in other words, that it could split the liability. The court, at this time, first repeated substantially the whole of the correct instruction partially quoted above. The foreman of the jury then indicated that further information was desired, particularly as to whether but one verdict could be brought in, or whether verdicts were required on the 13 forms submitted to it. The court thereupon

*This figure is not in accord with the prayer of the complaint which alleges $4,800 for each set of plaintiffs as their total damage. Respondents, not having appealed, cannot complain of this error, if error it was.

described the 13 counts of the complaint, told the jury that it was limited to a maximum of $3,950 for any one set of plaintiffs, and then stated: "Now, within that limit you may do as you wish in respect to the two forms of verdict, the thirteenth cause of action considered on one side and the twelve together as another group. If it be your view that there is both breach of contract and fraud, as they were described to you in the instructions, then in my opinion you should return verdicts on all thirteen of the causes of action." After informing the jury what it should do if it found fraud and no breach of contract, and vice versa, the court repeated: "If you feel that there should be a recovery on both types of action, the one for fraud and the one for breach of contract, then you should return twelve verdicts on the first twelve causes of action for the plaintiffs and one verdict for the plaintiffs on the thirteenth cause of action, dividing the total of your damages in such way as you wish—and I think counsel would agree that it wouldn't be particularly material how that was done. It could be a dollar on either. It wouldn't have to be mathematically precise so long as the total verdicts" received by any set of plaintiffs did not exceed $3,950. After conferring with counsel the court repeated that if both fraud and breach of contract were found, 13 verdicts for plaintiffs should be returned, and then stated: "but if you have fixed upon an amount as being what any one couple should recover, then that figure, whatever it is, ought to be divided between your two verdicts. * * * That

would constitute * * * a finding that there is a fraud and there is a breach of contract. If you settle on a figure as being what one particular couple ought to get, then put a part of that into the verdict for them individually, and a part of it will be their one-twelfth of the lump sum verdict. But, the two together, the one-twelfth plus the individual verdict should be the amount that you think is properly recoverable by them, and the division between the two causes of action would in my opinion be immaterial, whether you have one dollar in one and the balance in the rest or whether you divided 50-50 I don't think would make any substantial difference." When the foreman expressed some doubt on the matter, the court stated that if the jury found for plaintiffs on both theories, it should fix a single figure as the total damages suffered by each set of plaintiffs, "then break it down between two verdicts, the first—and it makes no difference how you allocate it, in my opinion— * * * would go into the individual verdict, one of those on the first twelve causes of action and the balance of that figure * * * include that as one-twelfth of the verdict on the thirteenth cause of action." Whereupon, the jury returned and shortly thereafter returned the 13 verdicts here involved.

Thus the jury was told, if it found both fraud and breach of contract, to bring in separate verdicts after arriving at the total damages and dividing that figure in any way it saw fit. This was error. It resulted in verdicts and judgments that are highly inconsistent and contradictory. If each set of respondents was dam-

aged in the amount of $1,250 by reason of Schmidt's failure to comply with the plans and specifications, as found by the jury in its verdicts on the first 12 counts, that same set of respondents was damaged in the amount of the same $1,250 because of Schmidt's breach of his contract to build in accordance with the plans and specifications. Yet the jury by its verdict on the 13th count has fixed this damage at an additional $12,000 for all respondents, or $1,000 for each set of respondents. This was done pursuant to erroneous instructions that it was permissible to thus split the total damages. Conceivably, the error would not have been prejudicial if both theories found by the jury were sustainable by the record. But, where, as here, nine of the separate verdicts are not sustainable, and the sustainable verdict is in a lump sum, it is obvious that this splitting of the damages was prejudicial to appellant as well as to respondents. This error, however, does not require a new trial on the issue of liability. Liability to all respondents for breach of contract, and, in addition, as to three of the respondents for fraud, has been established. Those issues need not be retried. The new trial should be limited to the issue of damages alone.

The judgments are reversed with instructions to the trial court to retry the issue of damages only, and when such damages have been ascertained, to enter judgments in favor of respondents in the amounts so fixed. Inasmuch as the basic question of liability has been determined adversely to appellant, and the issue of damages adversely to respondents, and inasmuch

as the reversal is as to damages only, it is ordered that respondents and appellant each bear their own costs on these appeals.

Peters, P. J.

Bray, J., and Wood (Fred B.), J., concurred.

Filed June 29, 1954,
Walter S. Chisholm, Clerk.

Appendix C

SPECIFIC PORTIONS OF RECORD SHOWING FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED.

From the first cause of action of complaint (R. 4-10):

III

That pursuant to the provisions of Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. 631, et seq.), and Executive Orders thereunder, the Civilian Production Administration issued Priorities Regulation 33 (32 C.F.R. 944.54). The Housing Expediter, pursuant to the Veterans' Emergency Housing Act of 1946, as amended (Chapter 268, Public Law 388, 79th Congress (2d Section) 60 Stat. 207, 50 U.S.C.A. App. Sec. 1821, et seq.), issued Housing Expediters Priorities Order 1 (11 F. R. 9507), which delegated to the Civilian Production Administration powers and authorities conferred upon the Housing Expediter by Sections 4 and 7 of said Act. By amendment to said Priorities Regulation 33 and schedules issued thereunder, the Civilian Production Administration exercised the powers and authorities conferred upon it by said Housing Expediters Priorities Order 1 and thereby said Priorities Regulation 33 was continued in effect by authority of both the said Veterans Emergency Housing Act and the said Second War Powers Act. Further, by Housing Expediters Priorities Order 5, as amended (60 Stat. 207), and Executive Order 936 (11 F.R. 1939), the Housing Expediter adopted, ratified and confirmed, and continued in effect said Priorities

Regulation 33, and that said Regulation was in effect during all times herein mentioned.

IV

That as a condition to granting priorities for materials and permission to build, paragraph (4) of said Priorities Regulation 33, as amended, provides that a builder constructing house accommodations under said regulations must do such work according to the plans, specifications and descriptions specifically submitted by such builder in making an application or applications required by the provisions of said Priorities Regulation 33, as amended. As a further condition to granting priorities for materials and permissions to build under said Regulation, paragraph (g) of said Priorities Regulation 33, as amended, provides that all housing accommodations completed after the effective date of said Regulation are subject to a maximum sales price established by the Federal Housing Administration.

V

That on or about the 30th day of April, 1946, defendant Max Schmidt, . . . made application to the Federal Housing Administration for priorities assistance to construct forty-eight (48) dwelling units under said Priorities Regulation 33, as amended, in the City of Millbrae, County of San Mateo, State of California, said building project to be commonly known as "Meadow Glen", Millbrae, California. A copy of said application and specifications therein is

attached hereto, marked Exhibit "A", and made a part hereof the same as though fully set forth herein.

VI

That pursuant to the provisions of said Priorities Regulation 33, as amended, said defendant, . . . submitted plans and specifications with the above mentioned application to the Federal Housing Administration, the said plans and specifications being a portion of the application submitted as aforesaid. A copy of the plans submitted by said defendants is attached hereto, marked Exhibit "B", and made a part hereof the same as though fully set forth herein.

VII

That the above mentioned plans and specifications specified, among other things, that said dwelling units would be constructed with exterior wall sheathing of wood, two 30,000 B.T.U. gas floor furnaces, one furnace to be in the combination dining-living room and the other furnace in a rear hall of said dwelling units, and that the interior wall surfacing and finish would be gypsum lath and plaster.

VIII

That in submitting the above mentioned application for priorities assistance, the said defendant, . . . promised and certified to the Federal Housing Administration that the said dwelling units would be constructed in accordance with the description given in said application and that the said defendants would

comply with all other provisions of Priorities Regulation 33 and other applicable Orders or Regulations in the construction and disposition of the dwelling units covered by the said application.

IX

That on or about the 6th day of May, 1946, the Federal Housing Administration, acting upon the above mentioned application of the defendants, granted to said defendants priorities assistance to construct the forty-eight (48) dwelling units specified in said application, and assigned Project Serial No. 66—121 08978 to the building project.

X

That thereafter said defendants used or caused to be used the priorities assistance so granted as aforesaid by the Federal Housing Administration to secure materials, and said materials were used in the construction of said dwelling units, and said defendants, and each of them, violated the said Veterans Emergency Housing Act, as amended, the Second War Powers Act, as amended, and the provisions of Priorities Regulation 33, as amended, as follows:

(Deviations are listed.)

XI

That plaintiffs, Albert Shell and Martha Shell, are now and at all times herein mentioned have been husband and wife. That plaintiff Albert Shell is now and at all times herein mentioned was a veteran of World War II.

XII

That on or about the 17th day of June, 1947, plaintiffs, Albert Shell and Martha Shell, entered into a contract in writing to purchase one of the above mentioned dwelling units from defendants. Said dwelling unit being situated in the City of Millbrae, County of San Mateo, State of California, commonly known as 476 Anita Drive, Meadow Glen, Millbrae, California.

XIII

That prior to the execution of the above mentioned contract the defendants falsely and fraudulently, and with intent to deceive and defraud the said plaintiffs, Albert Shell and Martha Shell, represented to said plaintiffs that the above mentioned dwelling unit was constructed in conformity with the provisions of Title III of the Second War Powers Act, as amended, the Veterans Emergency Housing Act of 1946, as amended, and all of the Orders and Regulations issued thereunder, and in conformity with the plans and specifications submitted by defendants to the Federal Housing Administration under said Acts, Orders and Regulations.

XIV

That the said representations made by defendants to said plaintiffs, Albert Shell and Martha Shell, were false and were then and there known by the defendants to be false and were made by said defendants to induce said plaintiffs to buy the said dwelling unit.

XV

That the plaintiffs, Albert Shell and Martha Shell, believed and relied upon said representations of the defendants and were thereby induced to enter into said contract of purchase, and have paid to defendants the sum of Twelve Thousand Dollars ($12,000.00) upon said contract.

XVI

That on or about the 9th day of November, 1948, said plaintiffs, Albert Shell and Martha Shell, ascertained for the first time that the said representations were untrue and that the said dwelling unit was constructed without exterior wall sheathing of wood, with only 1 30,000 B.T.U. gas floor furnace, instead of 2, and without interior wall surfacing and finishing of gypsum lath and plaster, in violation of said Veterans Emergency Housing Act, as amended, the Second War Powers Act, as amended, and the provisions of Priorities Regulation 33, as amended, and the plans and specifications submitted by defendants to the Federal Housing Administration, under the above mentioned Priorities Regulation 33, as amended.

[Similar allegations are set forth in counts two through twelve with reference to other sets of plaintiffs.]

From the thirteenth cause of action of complaint (R. 50-54):

Plaintiffs [naming all of the veterans and their wives] replead all of the allegations hereinabove con-

tained in paragraphs I, II, III and IV of plaintiffs Albert Shell's and Martha Shell's first cause of action, to which reference is hereby made and the same are hereby incorporated and referred to, and made a part hereof as though the same were again fully set forth.

II

That on or about the 20th day of April, 1946, defendant Max Schmidt, . . . entered into a written agreement with the Government of the United States of America, through its agent the Federal Housing Administration, a copy of said agreement being attached hereto, marked Exhibits "A" and "B", and made a part hereof the same as though fully set forth herein.

III

That said above mentioned agreement was made for the express benefit of veterans of World War II, and wives of veterans of World War II.

IV

That plaintiffs, Albert Shell and Martha Shell, are now and at all times herein mentioned have been husband and wife. That plaintiff, Albert Shell, is now and at all times herein mentioned was a veteran of World War II.

[Paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV recite that the other plaintiffs are veterans or wives of veterans.]

XVI

That said agreement above mentioned provided among other things, that defendants would construct the dwelling units mentioned in said agreement in conformity with the provisions of Title III of the Second War Powers Act, as amended, the Veterans Emergency Housing Act of 1946, as amended, and all of the Orders and Regulations thereunder, and in conformity with the plans and specifications submitted by said defendants to the Federal Housing Administration under said Acts, Orders and Regulations.

XVII

That, subsequent to the date of the above mentioned agreement, defendants constructed dwelling units under the terms of said agreement and during the year of 1947 sold one of said dwelling units to each of the above mentioned plaintiffs.

XVIII

That the dwelling units sold to plaintiffs, and each of them, by defendants were not constructed in conformity with the provisions of the said above mentioned agreement and said defendants, and each of them, violated the said agreement as follows: [Deviations are then stated.]

From Schmidt's demurrer to complaint (R. 71-74 and 76):

VI

That the first alleged cause of action set forth in plaintiffs' complaint does not state facts sufficient to constitute a cause of action. (R. 71.)

VII

That the second through twelfth causes of action set forth in plaintiffs' complaint similarly do not state facts sufficient to constitute a cause of action. (R. 71.)

XIX

That plaintiffs' alleged thirteenth cause of action does not state facts sufficient to constitute a cause of action. (R. 74.)

XXVII

That it appears from the face of the complaint that the alleged thirteenth cause of action is barred by the statute of limitations in that the said thirteenth cause of action is alleged to arise out of an agreement between the defendants and the government made for the benefit of third parties in accordance with certain statutes of the United States alleged in the complaint, and that the only portion of said statutes which expresses an intent to benefit third parties or to give third parties a right to sue thereon is subject to a one-year statute of limitations as a limitation upon the right thereby conferred. (R. 76.)

From Schmidt's answer to complaint:

I

That the plaintiffs' first cause of action does not state facts sufficient to constitute a cause of action. (R. 83.)

II

That the second through twelfth alleged causes of action set forth in plaintiffs' complaint similarly do not state facts sufficient to constitute a cause of action. (R. 83.)

III

That the plaintiffs' alleged thirteenth cause of action does not state facts sufficient to constitute a cause of action. (R. 83.)

IV

That the plaintiffs' alleged thirteenth cause of action does not state facts sufficient to constitute a cause of action in that it appears from the face of the complaint that the alleged thirteenth cause of action is barred by the Statute of Limitations set forth in Section 7(d) of the Veterans' Emergency Housing Act of 1946, 60 Stats. Ch. 268. (R. 83-84.)

Among the Additional Defenses pleaded were the following:

II

That if any contract existed between the defendants or any of them and the Federal Housing Administration or any other officer or agency of the federal government, said contract was modified by the mutual agreement with respect to all provisions on which plaintiffs' asserted claims are based. (R. 91.)

FILED
DEC 16 1954
HAROLD B. WILLEY, Cl

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 456

MAX SCHMIDT,
Petitioner,

vs.

ALBERT SHELL, MARTHA SHELL, ARTHUR G. JOHNSTON, DOROTHY E. JOHNSTON, EDWARD C. BRICHTA, DORA R. BRICHTA, FRANK W. DOUGLAS, EDITH E. DOUGLAS, DONALD W. TEETER, ANN TEETER, CASPAR J. HEXBERG, PATRICIA M. HEXBERG, KENNETH THUNEN, SHIRLEY THUNEN, GUSTAVE KOTTA, NELDA M. KOTTA, WILLIAM F. MITCHELL, WANDA MITCHELL, PETE C. RODRIGUEZ, NATALIE RODRIGUEZ, HERMAN T. SCHNEIDER, RITA B. SCHNEIDER, ERNEST S. COCCARY, and HELEN A. COCCARY,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal, State of California, First Appellate District, Division One.

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Respondents.

RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal, State of California, First Appellate District, Division One.

Respondents herein respectfully submit that no writ of certiorari should issue to review the judgment

of the District Court of Appeal, State of California, First Appellate District, Division One, entered in the above entitled cause on June 29, 1954.

ISSUE DECIDED.

The District Court of Appeal, State of California, First Appellate District, Division One, decided that veterans entering into a contract to purchase a home were not deprived of their common law rights and remedies because of the enumeration of additional remedies available to them under the Veterans' Emergency Housing Act of 1946. That opinion is printed in Appendix B of the Petition for Writ of Certiorari and is reported at 126 A.C.A. 378 and 272 Pac. (2d) 82.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respondents respectfully submit that the petition herein for writ of certiorari should be denied because:

(1) The California District Court of Appeal decided no federal question of substance;

(2) The issue decided by the State Court concerns only obliquely federal legislation no longer in force or effect;

(3) The decision of the State Court makes unnecessary any consideration of a federal question;

(4) The decision of the California District Court of Appeal is not erroneous.

THE CALIFORNIA DISTRICT COURT OF APPEAL DECIDED NO FEDERAL QUESTION OF SUBSTANCE.

Respondents initially brought the actions involved herein against one Max Schmidt, a building contractor, and others. Respondents' suit was grounded on common law causes of action for breach of contract and for fraud, which causes of action are, of course, recognized in California. Petitioner, Max Schmidt, contended in the trial Court and in the State Court of Appeal that respondents must necessarily be suing on the basis of the federal statute alone. With that theory, respondents herein took issue and that issue was the one which was decided by the State Court.

In its opinion, the District Court of Appeal merely held that persons contracting to purchase a home from a builder lose none of their common law rights merely because they are veterans, and because veterans have additional privileges conferred upon them by the Veterans' Emergency Housing Act of 1946. This decision of the State Court in no way falls within the purview or spirit of Rule 38, Subsection 5.

THE ISSUE DECIDED IN THE STATE COURT CONCERNS ONLY OBLIQUELY FEDERAL LEGISLATION NO LONGER IN FORCE OR EFFECT.

The Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. Appendix 1821, et seq.) was not a controlling statute so far as the issues which were before the State Court in this action. A reading of the State Court's decision indicates that the judgment in favor of respondents herein was based

entirely on a factual finding by a jury that there was a breach of common law contract between respondents and petitioner. The State Court affirmed the finding of the jury on the same basis. As stated in the State Court's opinion:

> "Respondents' theory is that they are suing on common law causes of action *not* grounded on the Veterans' Emergency Housing Act and that the federal statute is only relevant as setting up standards against which to measure the acts of the appellant in failing to perform according to the plans and specifications required by that statute." (Emphasis ours.)

We respectfully submit that although petitioner *claims* that the State Court held that a federal statute was the controlling aspect of its decision, the plain fact is that the State Court decision itself states that this is not so.

Petitioner also contends that the issue decided in this case is of importance in the administration of federal housing laws. This we think is an erroneous projection of the scope of the Veterans' Emergency Housing Act of 1946. That Act, by its terms, applied to a very narrow field of housing. It appelied to a very narrow group of persons and that Act was repealed in 1947. Quite apparently, any implications of the State Court decision in this case would be limited to that Act only and could have no possible bearing on any later legislation in the general field of housing.

The cases cited by petitioner involve actions brought specifically under the Veterans' Emergency Housing

Act of 1946 and not on common law grounds not requiring the aid of the Act. In *United States v. Sauers*, 99 F. Supp. 753 (D.C. Minn. 3rd Division), the government brought an action specifically under Section 7 A and C of the Act. In *United States v. Austin*, 100 F. Supp. 33 (D.C. Md.), the government brought an action under Section 7 A of the Act. In the case at bar, the only issue before the State Court was whether veteran purchasers of homes retained *common law rights*, despite the enumeration of other rights in a federal statute. *United States v. Austin*, supra, though not decisive of that issue, points rather clearly to the fact that the State Court decision is correct in principle. In that case, it was recognized that the government could seek restitution even though the Second War Powers Act of 1942 did not provide for this remedy. That case is merely one example of the well-recognized principle that an enumeration of remedies in remedial legislation does not abrogate rights or remedies which pre-existed the legislation.

THE DECISION OF THE STATE COURT MAKES UNNECESSARY ANY CONSIDERATION OF A FEDERAL QUESTION.

A reading of the State Court decision indicates that there were twelve sets of plaintiffs initially. The verdict of the jury in favor of the twelve sets of plaintiffs was based both on a breach of contract and on fraud practiced upon them. The California District Court of Appeal found that as to three sets of these plaintiffs, the judgment on the basis of fraud was

sustainable and that this judgment in no way required any consideration of federal legislation.

All plaintiffs joined in a thirteenth cause of action. The District Court of Appeal held that the thirteenth cause of action was supported on a non-federal ground. That ground was the one based on a breach of contract. It is our understanding that under such facts this Honorable Court will not consider the issues sufficient for the granting of certiorari. (*Application of Bayer,* 169 Fed. (2d) 770.)

THE DECISION OF THE CALIFORNIA DISTRICT COURT OF APPEAL IS NOT ERRONEOUS.

The only issue before the State Court was whether veterans who under California law had common-law remedies of breach of contract and actions for fraud under proper factual circumstances were deprived of those common law rights by the passage of the Veterans' Emergency Housing Act of 1946, in which Act certain additional remedies were set out. Neither respondents nor petitioner have been able to find a decision directly holding that under the Veterans' Emergency Housing Act of 1946 common law remedies of a purchaser remain in effect. However, under similar statutes similar issues have been presented to Federal Courts and have been decided in conformity with the decision of the District Court of Appeal in this case.

As pointed out in the opinion of the California District Court of Appeal, *Heinecke v. Parr,* 168 F.

(2d) 194, and *Keele v. Holt,* 171 F. (2d) 480, held that although, under the Second War Powers Act of 1942, neither that statute nor regulation 33 provided for actions for restitution or for an overcharge, such actions would lie under general equitable or common law principles. Under those cases, the common law remedies were held to exist *in addition* to those granted by statute. As noted above, in *United States v. Austin,* supra, it was recognized that the government would have an action for restitution even though the statute involved did not provide for this specific remedy. In *Adams v. Albany,* 80 F. Supp. 876, it was indicated, by way of dicta, that common law remedies existed under the Veterans' Emergency Housing Act of 1946.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Dated, Redwood City, California,
December 10, 1954.

Respectfully submitted,
ROPERS & MAJESKI,
By EUGENE J. MAJESKI,
Attorneys for Respondents.